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**INDIANA DEPARTMENT OF TRANSPORTATION  
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

**OBJECTIVES AND POLICY STATEMENT 49 CFR Sections 26.1 & 26.23**

The Indiana Department of Transportation (INDOT) is committed to implementing the Disadvantaged Business Enterprise Program as set forth in 49 CFR Part 26. The stated objectives of the program are:

To ensure nondiscrimination in the award and administration of USDOT-assisted contracts;

To create a level playing field of which DBEs can compete fairly for USDOT-assisted contracts;

To ensure that INDOT's DBE program is narrowly tailored in accordance with applicable law;

To ensure that only firms that fully meet the eligibility standards specified in 49 CFR Section 26 are permitted to participate as DBEs;

To help remove barriers to the participation of DBEs in USDOT-assisted contracts;

To assist in the development of firms that can compete successfully in the marketplace outside the DBE program;

To provide appropriate flexibility in establishing and providing opportunities for DBEs.

The DBE Liaison Officer, who will have direct, independent access to the Commissioner concerning DBE program matters, will be responsible for the implementation and administration of the DBE program.

This Policy Statement will be circulated throughout INDOT and to the DBE and non-DBE business communities that perform work on DOT-assisted contracts.

Signed: \_\_\_\_\_ Date Approved: \_\_\_\_\_  
Cristine M. Klika, Commissioner  
Indiana Department of Transportation

## **I. SUBPART A – GENERAL 49 CFR Section 26.3 – 26.13**

### **Issuing Agency**

Indiana Department of Transportation  
100 North Senate Avenue  
Indianapolis, Indiana 46204-2217  
(317) 232-5088

### **Scope**

The Indiana Department of Transportation, Disadvantaged Business Enterprise Program ("DBE Program") applies to federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21). It also applies to federal transit funds authorized by Titles I, III, V, and VI of ISTEA, or by federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21. The program applies to airport funds authorized by 49 U.S.C 47101, et seq.

### **Statutory Authority**

The following is a brief history of the Regulations, which implement the DBE Program:

USDOT Regulation (49 CFR Part 23) published in the Federal Register, Volume 45, No. 63 dated March 31, 1980 established a requirement that all recipients of Federal-Aid highway program funds establish a Minority Business Enterprise (MBE) Program. The regulation was applicable both to Federal-Aid construction and to its non-construction activities. USDOT published a further regulation in the Federal Register, Volume 48, No. 141 on July 21, 1983. This regulation implemented Section 105(f) of the Surface Transportation Assistance Act (STAA) of 1982, which provided that not less than a fixed percentage of the amounts authorized to be appropriated under the Act should be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. USDOT published a regulation in the Federal Register, Volume 52, No. 203 on October 21, 1987 implementing Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act ("STURAA") of 1987.

As a result of the decision by the United States Supreme Court in Adarand Constructors, Inc. v. Peña, 513 U.S. 1108, 115 S.Ct. 896, 103 L.Ed.2d 781 (1995), and its progeny in federal district courts across the country, USDOT promulgated a new regulation to meet the strict scrutiny test for affirmative action programs announced in Adarand. This new regulation, 49 CFR Part 26, was published in the Federal Register, February 2, 1999, 64 Fed. Reg. 5095, and repealed the former regulation found at 49 CFR Part 23, effective March 4, 1999, and requires each primary recipient of specified federal-aid, including INDOT, to develop and implement a Disadvantaged Business Enterprise program consistent with Part 26 by September 1, 1999, as a condition to receiving federal-aid funding. The regulation observes a national aspirational goal of 10% DBE participation in federal-aid public works construction; requires primary recipients to establish

yearly overall goals based on local availability of DBEs ready, willing and able to participate in public works construction; requires primary recipients to use race-neutral means to achieve annual DBE participation goals, and mandates size limits on certified DBEs.

USDOT's legal authority for 49 CFR Part 23 (as amended) and Part 26, includes sundry Executive Orders, 23 U.S.C. 324, 42 U.S.C. 2000d et seq., and 49 U.S.C. 1615, 47107, 47113, and 47123.

**Effective date:** October 1, 1999.

## **Definitions 49 CFR Section 26.5**

The following are definitions of terms used by INDOT in conjunction with its DBE Program:

*Affiliation* - has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR Part 121. Concerns are affiliates of each other when, either directly or indirectly; one concern controls or has the power to control the other; a third party or parties controls or has the power to control both; or an identity of interest between or among parties exists such that affiliation may be found. In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

*Alaska Native* – means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

*Alaska Native Corporation (ANC)* – means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended.

*Commissioner* – refers to commissioner of INDOT or the designee of the commissioner.

*Compliance* - a recipient has correctly implemented the requirements of this part.

*Contract* - means the written agreement between INDOT and the contractor setting forth the obligations of the parties

*Contractor* - means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway program.

*Department or DOT* - means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

*Disadvantaged Business Enterprise or DBE* - means a for profit small business concern that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals, and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

*Good faith efforts* - means efforts to achieve a DBE goal or other requirement which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

*IDOA* - means the Indiana Department of Administration.

*INDOT* - means the Indiana Department of Transportation.

*Immediate family member* - means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

*Indian Tribe* - means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaskan Native Corporation (ANC), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides.

*Joint venture* - means an association of a DBE firm and one or more other firms to carry out a single, for profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

*Native Hawaiian* – means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

*Native Hawaiian Organization* – means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

*Noncompliance* – a recipient has not correctly implemented the requirements of this part.

*Operating Administration or OA* – any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal

Transit Administration (FTA). The “Administrator” of an administration includes his/her designees.

*Personal Net Worth* - means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm, or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

*Primary industry classification* - means the four digit Standard Industrial Classification (SIC) codes designation which best describes the primary business of a firm. The SIC code designations are described in the Standard Industry Classification Manual. As the North American Industrial Classification System (NAICS) replaces the SIC system, references to SIC Codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes.

*Primary Recipient* – means a recipient, which receives DOT financial assistance and passes some, or all of it onto another recipient.

*Principal place of business* - means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

*Program* – means any undertaking on a recipient’s part to use DOT financial assistance, authorized by the laws to which this part applies.

*Race-conscious* - measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

*Race-neutral* - measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, race-neutral includes gender-neutrality.

*Recipient* - is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

*SBA* - is the United States Small Business Administration.

*Secretary* – means Secretary of Transportation or his/her designee.

*Set-aside* – means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

*Small Business Concern* - means a small business concern as defined pursuant to section 3 of the Small Business Act and SBA regulations implementing it (13 CFR Part 121) that

also does not exceed the cap on average annual gross receipts specified in 49 CFR Part 26.65(b).

*Socially and Economically Disadvantaged Individual* - means (i) any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is an individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis; or (ii) any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

- (a) Black Americans which includes persons having origins in any of the Black racial groups of Africa;
- (b) Hispanic Americans which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- (c) Native Americans which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
- (d) Asian-Pacific Americans which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
- (e) Subcontinent Asian Americans which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
- (f) Women;
- (g) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

*Tribally owned concern* - means any concern at least 51 percent owned by an Indian tribe as defined in this section.

*USDOT-assisted contract* - means any contract between INDOT and a contractor (at any tier) funded in whole or in part with USDOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

## **Guidance and Interpretation 49 CFR Section 26.9**

INDOT acknowledges that only guidance and interpretations consistent with 49 CFR Part 26 and issued after March 4, 1999 have definitive and binding effect and constitute the official position of the U.S. Department of Transportation. INDOT further acknowledges that guidance and interpretations are valid and binding only if they are issued over the signature of the Secretary of Transportation or contain the following statement: “The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR Part 26.”



## **Record Keeping 49 CFR Section 26.11**

INDOT will continue to submit quarterly DBE Reports to the Department, as directed by DOT operating administrations. In addition, INDOT will create and maintain a bidders' list, consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on DOT-assisted projects. Therefore, all firms bidding on prime contracts and bidding or quoting subcontracts on DOT-assisted projects must provide the following information:

- Firm's name;
- Firm's address;
- Firm's status as a DBE or non-DBE;
- The age of the firm; and
- The annual gross receipts of the firm
- Approximately how many INDOT projects has the firm bid or quoted in the past 12 months. (If none, please indicate 0)
- In what market have you participated?
  - Prime
  - Subcontractor
  - Trucker
  - Consultant

Upon receipt of the foregoing information, INDOT's Civil Rights Division will create a bidders' list. After creation of the bidders' list, INDOT will keep a running tally of actual payments by maintaining an accurate record of all subcontracts that are approved, all progress estimates that are processed, and all checks that are written by the Auditor of the State of Indiana.

## **Assurances 49 CFR Section 26.13**

Each financial assistance agreement INDOT signs with a DOT operating administration (or a primary recipient) must include the following assurance:

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR Part 26, and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation, and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions, as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

Each federal-aid contract INDOT signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract, or such other remedy, as INDOT deems appropriate.

## **II. SUBPART B – ADMINISTRATION 49 CFR Sections 26.25 - 26.37**

### **Liaison Officer 49 CFR Section 26.25**

The person designated by the Commissioner as the DBE Liaison Officer, is the Chief of the Civil Rights Division for the Indiana Department of Transportation. The DBE Liaison Officer reports to the Commissioner on matters pertaining to the DBE Program. This person shall have the responsibility for developing, managing, and implementing the DBE program. The DBE Liaison Officer works closely with the Division Chiefs affected by the DBE Program.

The specific duties of this office include but are not limited to:

1. Developing INDOT's DBE Title VI Program for approval by the Commissioner.
2. Serving as the agency liaison and public relations officer with the DBE community, contractors, consultants and other agencies concerned with the DBE program, including lending institutions, bonding and insurance agencies.
3. Identifying and soliciting DBE participation in all phases of the highway industry and providing them with procedures and specifications for seeking participation.
4. Assisting DBEs with identification of problems and potential solutions to those problems.
5. Disseminating information on the opportunities available to the DBE, which would provide the DBE opportunity to equitably pursue those opportunities.
6. Informing parties of contracts or services with INDOT, of their obligations relative to the DBE Program.
7. Monitoring the activities of the parties of contracts or services with INDOT in order to evaluate their affirmative action toward utilizing DBEs as subcontractors, vendors, suppliers, etc.

8. Monitoring the activities of the departmental units within INDOT and evaluating their efforts of compliance with the DBE program.
9. Keeping the Commissioner knowledgeable of the progress and deficiencies of the program and making recommendations to correct any deficiencies.

#### **Financial Institutions 49 CFR Section 26.27**

INDOT will thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals within the state and make reasonable efforts to use these institutions. INDOT will also encourage prime contractors to use such institutions.

#### **Prompt Payment 49 CFR Section 26.29**

To ensure that all obligations under subcontracts awarded to all subcontractors are met, INDOT will include in its contracts the following clause: "Within ten (10) business days of receipt of payment for estimates, prepared by the Engineer, of the value of the work performed and materials complete in place in accordance with this Contract, the prime contractor shall make payment to the subcontractors for the value of their work performed and materials complete in place in accordance with this Contract. Failure to comply with this clause shall constitute a material breach of this Contract and may result in sanctions under the contract."

Any delay or postponement of payment among the parties may take place only for good cause, with INDOT's written approval. The explanation from the prime contractor shall be made in writing to INDOT.

#### **Release of Retainage to Subcontractors 49 CFR Section 26.29**

If the Contractor is withholding portions of payments due subcontractors as retainage, the Contractor shall release such retainage to the subcontractor within 30 calendar days after satisfactory completion of the work performed by the subcontractor.

For the purposes of this section, satisfactory completion shall be interpreted, as when the subcontractor has completed all physical work and completed other contract requirements, including the submission of all submittals required by the specifications and the Department.

#### **DBE Directory 49 CFR Section 26.31**

IDOA will maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in the program. In the listing for each firm, IDOA will include its address, phone number, and the types of work the firm has been certified to perform as a DBE. The directory will be updated, at least annually, by IDOA and

provided to contractors upon request. IDOA shall make the directory available to the public upon request. The Directory will also be available on-line from the IDOA home page at <http://www.ai.org/idoa/minority/dbespect.htm>

### **Overconcentration 49 CFR Section 26.33**

If INDOT determines that its certified DBE firms are so overconcentrated in a certain type of work, as to unduly burden the opportunity of non-DBE firms to participate in that type of work, it will devise appropriate measures to address the overconcentration and submit them to its operating administration for approval.

The measures may include, but are not limited to, the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which INDOT has determined that non-DBEs are unduly burdened. INDOT may also consider varying its use of contract goals, to the extent consistent with 49 CFR Section 26.51 to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

However, if INDOT determines that there is overconcentration, measures as stated previously, will not be used until such are approved by the USDOT. If such approval is obtained, the measures will become part of INDOT's DBE Program.

### **Business Development & Mentor-Protégé Training Program 49 CFR Section 26.35**

In an effort to promote business development, assist small businesses to move into non-traditional areas of work, and to assist small business DBE firms to gain the ability to compete successfully in the marketplace outside the DBE program, INDOT will develop a Business Development Program (BDP), which will include mentor-protégé training. Business Development Programs (BDP), including mentor-protégé training, are good examples of race-neutral methods INDOT may use to promote the participation of DBEs and other small businesses in its contracting programs. Because INDOT must meet the maximum feasible portion of its overall goal by race-neutral means, INDOT's BDP, including mentor-protégé training, will be open to both certified DBEs and other small businesses. When completed, INDOT will submit its BDP, including its mentor-protégé training program, for approval by the Federal Highway Administration (FHWA) before INDOT implements it. Once approved by FHWA, the BDP will become part of INDOT's DBE program.

**Business Development Program:** INDOT shall provide business development through its Supportive Services Program and its mentor-protégé program. Even though one of the purposes of a BDP is to equip DBE firms to compete in the market outside the DBE program, INDOT will not ask BDP participants, as a condition of receiving BDP assistance, to agree to leave the DBE program after a certain number of years, or after certain business development objectives have been achieved. INDOT believes such a request would discourage firms from participating in the BDP.

INDOT's BDP, including its mentor-protégé training program, will strive to provide assistance to small business concerns, including DBEs, in the areas of:

- (1) Profitability;
- (2) Sales, including improved ratio of non-traditional contracts to traditional-type contracts;
- (3) Net worth, financial ratios, working capital, capitalization, access to credit and capital;
- (4) Ability to obtain bonding;
- (5) In the case of DBE's, a positive comparison of the DBE's business and financial profile with profiles of non-DBE businesses in the same area or similar business category; and
- (6) Good management capacity and capability.
- (7) Other managerial and technical services

**Mentor-Protégé Training:** In the mentor-protégé training program, another DBE or non-DBE firm will be the principal source of business development assistance to a DBE firm. To make its mentor-protégé relationships feasible, INDOT will not treat mentors and proteges as affiliates of one another for size determination purposes. A DBE involved in a mentor-protégé agreement must be an independent business entity that meets the requirements for certification and must be certified before it begins participation in a mentor-protégé arrangement.

Any mentor-protégé relationship will be based on a written development plan that will be approved by INDOT. The written development plan will clearly set forth the objectives of the parties and their respective roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protege. The formal mentor-protégé agreement may set a fee schedule to cover the direct and indirect cost for such services rendered by the mentor for specific training and assistance to the protege through the life of the agreement. During the course of the mentor-protégé relationship between a non-DBE mentor and a DBE protege, not more than one-half (½) of a contract DBE goal can be met by the DBE protégé.

### **Monitoring DBE Program Participation 49 CFR Section 26.37**

INDOT will monitor DBE Program participation from letting to contract finalization.

The INDOT Civil Rights Division shall review all contracts with DBE requirements and provide technical assistance to INDOT divisions/districts, DBEs, and contractors during the execution of those contracts.

District EEO Officers and Project Engineers/Supervisors shall monitor DBE and contractor participation.

INDOT final contract personnel shall monitor DBE and contractor participation through submitted Disadvantaged Business Enterprise Utilization Affidavit (Form DBE-3).

Failure of the Prime Contractor to achieve its DBE commitment, will result in automatic referral to the prequalification committee.

### **III. SUBPART C – GOALS 49 CFR Section 26.41**

#### **The National 10% Goal 49 CFR Section 26.41**

The federal statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs. This 10 percent goal is an aspirational goal at the national level, which the USDOT uses as a tool in evaluating and monitoring DBE's opportunities to participate in DOT-assisted contracts. However, this national 10 percent goal does not authorize or require INDOT to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if its goals are above or below 10 percent.

#### **Quotas and Set-Asides 49 CFR Section 26.43**

INDOT will not use quotas for DBEs on U.S. DOT-assisted contracts. In addition, INDOT will not use set-aside contracts for DBEs on U.S. DOT-assisted contracts. However, INDOT is aware, that in limited and extreme circumstances, it may use set-asides when no other method can be reasonably expected to redress egregious instances of discrimination.

#### **The Goal Setting Process 49 CFR Section 26.45**

#### **Public Participation 49 CFR Section 26.45**

INDOT's proposed overall goal and its rationale for federal fiscal year 2000 was published in general circulation media, available minority-focused media, and trade association publications. The goal and its rationale was available for inspection for 30 days following the date of the publication, and INDOT accepted comments on the goal for 45 days from the date of the publication. In addition, INDOT conducted four (4) public hearings in strategically located regions across the state to encourage public comments. Finally, INDOT consulted with minority, women's, and general contractor groups, and community organizations to ensure that all-relevant data had been considered. INDOT's overall goal for each federal fiscal year 2000 was finalized only after it provided the foregoing public participation.

As with the public participation process provided for federal fiscal year 2000, INDOT's proposed overall goal and its rationale will be published in general circulation media, available minority-focused media, and trade association publications. The goal and its rationale will be available for inspection for 30 days following the date of the publication, and INDOT will accept comment on the goal for 45 days from the date of the publication. In addition, INDOT will conduct public hearings in strategically located regions across the state to encourage public comments. Finally, INDOT will consult with minority, women's, and general contractor groups, and community organizations to ensure that all-relevant data has been considered. INDOT's overall goal for each federal fiscal year will be finalized only after providing the foregoing public participation. The overall goal will be adjusted if INDOT is made aware of other pertinent information that has been overlooked.

## **Setting the Overall Goal 49 CFR Section 26.45**

INDOT will set an overall goal for DBE participation in its DOT-assisted contracts. INDOT'S overall goal will be based on demonstrable evidence of the availability and capacity of ready, willing, and able DBEs relative to the availability and capacity of all businesses ready, willing, and able to participate in DOT-assisted contracts. The overall goal will reflect INDOT's determination of the level of DBE participation it would expect, absent the effects of discrimination.

INDOT's overall goal will be expressed as a percentage. This percentage, when applied to the total federal highway construction funds received by INDOT during the year, represents the amount of dollars that DBE firms working on INDOT contracts as prime contractors, subcontractors, or truckers should receive. This includes both construction contracts and consulting contracts.

The goal for each federal fiscal year will be determined by August 1, except the goal for fiscal year 2000 will be submitted to FHWA by August 31, 1999.

The goal will be determined using the following methodology:

The available data will be analyzed in two different ways – capacity and availability based on historical performance.

The capacity formula will be determined by comparing the capacity of Ready, Willing, and Able (RWA) DBE firms in the highway construction marketplace in Indiana with the capacity of all firms in the Indiana highway construction market. This includes components representing construction work, consulting contracts, trucking, and supplies used on construction contracts.

Firms will be considered as ready, willing, and able if they either participated in the program over the past year or were known to have had an interest in participating. For DBE firms, this will be determined by examining whether the firm was certified and had either performed work on an INDOT contract in the past year or was known to have sought such work. This will involve a case-by-case determination of each certified firm. The universe of all non-DBE ready, willing, and able firms will be determined by examining whether a firm had either bid on an INDOT contract, performed as a subcontractor, or submitted subcontractor quotes during the previous year.

For the construction component for federal fiscal year 2000, the capacity of firms was based on prequalification ratings established by INDOT. However, in the future, the capacity of firms will be based on prequalification ratings and the bidders' list established and maintained by INDOT. Prequalification limits are determined by analyzing financial position, equipment, construction experience and other information about a specific company. The total capacity of DBE firms is the aggregate of the INDOT prequalification limits for each prequalified DBE firm (both those firms doing prime contract work and those firms doing only subcontract work) plus the number of additional firms (those not prequalified) times \$300,000. Since INDOT requires prequalification for all firms doing an aggregate of more than \$300,000 of work at one

time, the capacity of all firms without prequalification was set at \$300,000. The capacity of all firms will be determined in the same manner. Those capacities of those firms with an unlimited prequalification will be calculated at \$100,000,000 which is the upper limit of prequalification.

To the extent that data is available, the consultant capacity will involve an examination of distinct areas, including but not limited to, design, construction inspection, environmental and right-of-way. Capacity of firms will be based on determinations that various INDOT divisions have previously made regarding the capacity of these firms.

The second method will examine historical accomplishments using the most recent year for which reasonably complete data was available. This will be done by comparing dollars received by DBE firms on federal-aid contracts (based on contracts awarded to DBE prime contractors and subcontracts as reported through the commitments submitted with a contractor's bid and the DBE-3 forms submitted at the conclusion of the job) with the total federal-aid program. Data from consultant contracts will also be included in this examination. These numbers will be adjusted to reflect those DBE firms that had participated during the review period but that are no longer eligible for the program.

INDOT's overall goal will be set within the range provided by these two ratios.

#### **Transit Vehicle Manufacturer (TVM) 49CFR Section 26.49**

Each transit vehicle manufacturer (TVM), as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section. The TVMs must establish and submit for FTA's approval an annual overall percentage goal. The goal represents the percentage of financial assistance from FTA that are received by the manufacturer from recipients of FTA funds for the purchase of transit vehicles spent with DBEs. The bidder shall certify that this requirement has been met as a part of the bid.

#### **Race-Neutral Means 49 CFR Section 26.51**

INDOT will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation.

The amount of the overall goal that can be met through race-neutral means will be determined each year by examining the following factors for construction and consultant expenditures:

- the dollar amount of prime contracts awarded to DBE firms through the competitive bidding process,
- the dollar amount of work subcontracted to DBE firms that exceeds the goal on those federal-aid contracts that have contract goals,
- the dollar amount of work subcontracted to DBE firms on contracts for which no contract goals have been set, and
- the dollar-amount of work subcontracted to DBE firms on those federal-aid contracts that have contract goals where the decision to use the DBE firm was made for a reason other than meeting the goal.



INDOT will track utilization of DBE firms and keep appropriate records in order to determine the race-neutral utilization of DBE firms.

#### **Contract Goals 49 CFR Section 26.51**

INDOT will set contract goals to meet any portion of the overall goal it does not project being able to meet using race-neutral means. However, contract goals will only be used on those DOT-assisted contracts that have subcontracting possibilities.

INDOT will continually monitor the use of race-neutral and race-conscious measures and will adjust its contract goals either up or down, as needed, to ensure that its contract goals are at an appropriate level for meeting INDOT's overall goal.

#### **IV. SUBPART C - GOOD FAITH EFFORTS 49 CFR Section 26.53**

##### **Guidelines for Determining Good Faith Efforts**

Appendix A of 49 CFR Part 26 and Section 103.01 of INDOT's Standard Specifications, and applicable contract special provisions, which are incorporated herein by reference, have been used for guidance in preparing INDOT's procedures to determine the adequacy of good faith efforts. Additional factors consistent with 49 CFR Part 26, and INDOT's policies and procedures have also been utilized.

The following factors will be considered in determining good faith efforts. The Prime Contractor, including DBE Prime Contractors, shall submit evidence on each of the factors.

1. The Prime Contractor shall make reasonable efforts to contact all Ready, Willing, and Able DBEs who express a desire to work on any of the pay items of the contract.
2. To effectively participate, the DBE shall have the opportunity to analyze the contract and submit quotations prior to letting. Information provided by the Prime Contractor to the DBEs shall include, at a minimum, the contract number, pay items and quantities for those pay items to be subcontracted, and the date the subcontract bid is desired.
3. The Prime Contractor shall select the portions of the work to be performed by DBEs in order to increase the likelihood of DBE participation. This shall include, where appropriate, an attempt to break down the contract into economically feasible units to facilitate DBE participation.
4. The Prime Contractor and DBE Supportive Services shall provide the interested DBEs with complete information about the plans, specifications, and requirements of the contract. Attempts shall be made to have plans available or to notify the DBE of the location of

available plans. The Prime Contractor shall notify the DBE of revisions to the contract.

5. It will be considered unacceptable to avoid subcontracting to DBEs if such subcontracting to DBEs results in the need to further subdivide remaining work items.
6. The Prime Contractor shall negotiate in good faith with interested DBEs and not reject such DBEs as unqualified without sound reasons based on thorough investigation of their capabilities. Confirmed documentation that a DBE has not been able to perform previous work through no fault of others will be considered to be sound reason. Unacceptable criteria include, but are not limited to, unsubstantiated oral statements and unsigned documentation.
7. The Prime Contractor shall make efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by the State of the Prime Contractor. However, the Prime Contractor shall affirmatively consider waiving requirements it may have in order to assist the DBE.
8. Only firms certified as DBEs prior to the letting date can be used to meet the contract goal for INDOT's DBE Program.

**Bidder Documentation 49 CFR Section 26.53 (b)(2)**

In solicitation for DOT-assisted contracts for which a contract goal has been established, INDOT will require all bidders to submit the following:

- (1) The names and addresses of DBE firms that will participate in the contract.
- (2) A description of the work that each DBE will perform.
- (3) The dollar amount of the participation of each DBE firm participating.
- (4) Written documentation of the bidder's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal.
- (5) Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment.
- (6) If the contract goal is not met, evidence of good faith efforts.

**Administrative Reconsideration 49 CFR Section 26.53 (d)**

If INDOT establishes a DBE contract goal and determines that the apparent low bidder failed to make good faith efforts to achieve that goal, it will provide the bidder an opportunity for an administrative hearing, in accordance with Indiana's Administrative Orders and Procedures Act, before awarding the contract.

## **DBE Termination for Convenience 49 CFR Section 26.53(f)**

The Prime Contractor may not terminate for convenience a DBE subcontractor listed on its Affirmative Action Certification (or an approved substitute DBE firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without INDOT's prior written consent. If, however, a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, INDOT will require the Prime Contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE.

## **V. COUNTING DBE PARTICIPATION TOWARD GOALS 49 CFR Section 26.55**

### **Prime Contracts 49 CFR Section 26.55 (a) (1)**

When INDOT awards a contract to a DBE, INDOT will count the total value of the contract toward its DBE goal.

### **Services 49 CFR Section 26.55 (a) (2)**

For services, INDOT will count toward DBE goals the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a USDOT-assisted contract, provided the fee is reasonable and not excessive, as compared with fees customarily allowed for similar services.

### **Subcontracts 49 CFR Section 26.55 (a) (3)**

For subcontracts, INDOT will count the entire amount of that portion of a subcontract that is performed by the DBE's own forces, including the cost of supplies and materials obtained by the DBE for the work of the subcontract. INDOT will also count supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).

### **Joint Ventures 49 CFR Section 26.55 (a)**

When a DBE performs as a participant in a joint venture, INDOT will count toward its DBE goal that portion of the total dollar value of the contract equal to the distinct and clearly defined portion of the work of the contract that the DBE either performs with its own forces or subcontracts.

### **Commercially Useful Function 49 CFR Section 26.55 (a)(3)(b)**

Expenditures to a DBE contractor will be counted toward DBE goals, only when the DBE is performing a commercially useful function on that contract.

- (1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be

responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, INDOT must evaluate the amount of work subcontracted, industry practices, whether the amount the DBE firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

- (2) INDOT will not consider a DBE to have performed a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, INDOT will examine similar transactions, particularly those in which DBEs do not participate.
- (3) If a DBE does not perform or exercise responsibility for at least the percentage determined in INDOT's Standard Specifications or Special Provisions of the total cost of its contract with its own workforce, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, INDOT will presume that the DBE is not performing a commercially useful function.
- (4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the prime contractor and/or DBE may present evidence to INDOT to rebut this presumption. INDOT may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.
- (5) INDOT's decisions concerning commercially useful function matters are subject to review by FHWA, but are not administratively appealable to USDOT.

#### **Trucking 49 CFR Section 26.55(d)**

INDOT will count trucking done by DBE firms toward DBE goals based on the following factors:

- (1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
- (2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract. For purposes of this program, a long-term lease of at least 12 months will be considered as ownership.
- (3) DBE credit will be allowed for the total value of the transportation services the DBE provides on the contract using trucks it owns, insures, and operates using drivers it employs.

- (4) The DBE may lease trucks from another DBE firm, including owner-operators certified as DBEs. DBE credit will be allowed for the total value of the transportation services the lessee DBE provides on the contract.
- (5) The DBE may also lease trucks from non-DBE firms or non-DBE owners-operators. When a DBE leases trucks from a non-DBE, DBE credit will be allowed for the value of transportation service provided on the contract by trucks equal in number to the number of trucks used under subsections (3) and (4). DBE credit will also be given for any fee or commission the DBE receives as a result of the lease arrangement for any additional non-DBE trucks.
- (6) For purposes of counting under (4) and (5) above, the lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

#### **DBE Manufacturers and Material Suppliers 49 CFR Section 26.55(e)**

INDOT will count expenditures with DBEs for materials or supplies toward DBE goals in the following:

- (1) If the materials or supplies are obtained from a DBE manufacturer, INDOT will count 100 percent of the cost of the materials or supplies count toward the DBE goal. A manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
- (2) If the materials or supplies are purchased from a DBE regular dealer, INDOT will count 60 percent of the cost of the materials or supplies toward the DBE goal. A regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specification and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided for in the above paragraph if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this section.

- (3) With respect to materials purchased from a DBE that is not a manufacturer or regular dealer, INDOT will count the amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided it is determined the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. INDOT will not count any portion of the cost of the materials and supplies themselves toward DBE goals.

### **Effects of Removal of Eligibility 49 CFR Section 26.87**

When a firm is removed from eligibility, the following steps will be taken:

1. When a prime contractor has made a commitment to use the ineligible firm, or INDOT has made a commitment to use the firm as a prime contractor, but a subcontract or contract has not been executed before IDOA issues the Notice of Decision, the ineligible firm does not count toward the contract goal or overall goal. The prime contractor will be directed to meet the contract goal with an eligible DBE firm or demonstrate that it has made a good faith effort to do so.
2. If a prime contractor has executed a subcontract with the firm before IDOA notifies the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward the DBE goal for the firm's work. In this case, or in a case where a prime contract was let to a DBE later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the issuance of the notice of its eligibility shall not count toward INDOT's overall goal, but may count toward the contract goal.
3. Exception: If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, INDOT may continue to count its participation on that contract toward overall and contract goals.

## **VI. SUBPART D – CERTIFICATION 49 CFR Section 26.61**

INDOT is part of a centralized certification system managed by the Indiana Department of Administration, Minority Business Development Division (IDOA). IDOA will use the certification standards in Subpart D of Part 26 and the certification procedures in Subpart E of Part 26 to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts. To be certified as a DBE, a firm must meet all certification eligibility standards. IDOA will make its certification decisions based on the facts as a whole. Details on the process for certification, appeals and other issues are included as Attachment A.

## **VII. SUBPART E – UNIFIED CERTIFICATION PROGRAM 49 CFR Section 26.81**

Because INDOT and IDOA are currently in a centralized certification system for state certification, both entities have the experience of developing the cooperation that will be required to create a Unified Certification Program (UCP) among the varied transportation modes. An agreement will be executed by February, 2002.

The agreement will include the following:

- (1) The establishment of a UCP meeting all requirements of this section.
- (2) Specify that the UCP will follow all certification procedures and standards, on the same basis as recipients, that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters.
- (3) Commitment of recipients of ensuring that the UCP has sufficient resources and expertise to carry out the requirements.
- (4) An implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.

## **VIII. SUBPART F - COMPLIANCE AND ENFORCEMENT 49 CFR Section 26.101**

### **Compliance Procedures 49 CFR Section 26.101**

Whenever INDOT has reason to believe the sub-recipient or the contractor or any subcontractor, supplier, or lessee on a DOT-assisted contract may not be operating in compliance with the terms, conditions or requirements of the DBE Program, INDOT will conduct an investigation. If it is found that the sub-recipient, or the contractor or any subcontractor, supplier or lessee is not in compliance with the DBE Program or contract special provisions, the non-compliant party or parties will be notified in writing. A compliance conference to discuss the area(s) of noncompliance will be held between INDOT and the non-compliant party or parties. In the event that the non-compliant party

or parties fail(s) or refuse(s) to perform in compliance with the DBE Program or contract special provisions, a “Notice of Non-Compliance” will be issued. If the non-compliant party or parties correct(s) the deficiencies, the “Notice of Non-Compliance” will be rescinded. If the deficiencies are not corrected, INDOT will initiate administrative action against the non-compliant party, which may include but not be limited to:

- Termination of the contract.
- Initiation of appropriate debarment or decertification proceedings.
- Referral to the prequalification committee.
- Other actions as appropriate, at the discretion of INDOT.

### **Noncompliance Complaints 49 CFR Section 26.103**

Any person who believes that INDOT has failed to comply with its obligations under the terms, conditions or requirements of the DBE Program, may file a written complaint with the Commissioner of INDOT. Upon receipt of said complaint, the Commissioner will evaluate the merits of the complaint. If within 60 calendar days of submission of the complaint, the complainant’s concerns have not been addressed, the complainant may file a written complaint with the operating administration’s Office of Civil Rights within 180 days after the date of the alleged violation or the date on which he/she learned of a continuing course of conduct in violation of the terms, conditions or requirements of the DBE Program.

### **IX. CONFIDENTIALITY 49 CFR Section 26.109**

INDOT recognizes that, in responding to requests for information concerning any aspect of the DBE program, the U.S. Department of Transportation will comply with the provisions of the Federal Freedom of Information and Privacy Acts and that any information concerning the DBE program, release of which is not prohibited by Federal law, may be made available to the public. INDOT will safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, state, and local law.

Notwithstanding the above, INDOT shall keep the identity of complainants confidential, at the election of the complainant. However, if such confidentiality will hinder the investigation, proceeding, or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant will be advised for the purpose of waiving the privilege. INDOT will advise complainants that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing.

INDOT and all other participants will cooperate fully and promptly with the U.S. Department of Transportation and INDOT compliance reviews, certification reviews, investigations, and other requests for information. INDOT acknowledges that failure to fully and promptly cooperate shall be ground for appropriate action against the party involved.



INDOT, its contractors and participants, will not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by 49 CFR part 26 or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under 49 CFR part 26. INDOT acknowledges that violation of this prohibition constitutes noncompliance.

## **WAIVERS                      49 CFR Section 26.15**

As noted in the February 2, 1999, Federal Register, waivers are for those situations where a recipient believes that it can better accomplish the objectives of the Disadvantaged Business Enterprise (DBE) program through means other than the specific provisions of Part 26. In addition, waivers allow the USDOT and a recipient to work together to respond to unique local circumstances. The Indiana Department of Transportation (INDOT) agrees with the USDOT's belief that the waiver provision is an important aspect of the DBE program.

With respect to its waiver requests, INDOT officials impaneled a DBE Task Force (Task Force), which consists of representatives from INDOT, the Indiana Department of Administration (IDOA), Federal Highway Administration, Indiana Constructors, Inc. (ICI), DBE Contractors, and Non-DBE Contractors, to assist INDOT in the drafting of INDOT's new DBE Plan. Prior to the writing of the Draft Plan, the Task Force met on several occasions to discuss the requirements of Part 26, review current INDOT practices and policies, and identify unique circumstances in Indiana. After those meetings, the Task Force concluded that many of INDOT's current practices and policies, rather than the specific provisions of Part 26, would better accomplish the objectives of the DBE program. In addition, the Task Force concluded that there are unique circumstances in Indiana that needed to be addressed by INDOT that had not been addressed in Part 26. Because of these conclusions, the Task Force drafted five (5) waivers it believes essential to an effective INDOT DBE Plan.

A legal notice on INDOT's proposed waivers was published on or about July 14, 1999, in general circulation media, available minority-focused media, and trade association publications. Although Part 26 only requires one (1) public hearing, INDOT considered public participation so critical, it chose to conduct four (4) public hearings in strategically located regions across the state. During the course of the four (4) public hearings, INDOT accepted comments on its proposed waivers, as well as its proposed overall goal.

Four (4) days after the final public hearing, the Task Force reconvened to discuss the comments presented during the public hearings and to re-evaluate INDOT's proposed waivers to ensure that all comments and concerns expressed at the public hearings had been addressed. After serious consideration and much deliberation, the Task Force made several revisions to INDOT's proposed waivers in an attempt to address legitimate concerns expressed during the course of the public hearings. Two (2) days later, INDOT representatives met to further review comments presented at the public hearings, and during the course of that meeting, made additional revisions to INDOT's waivers.

At this time, INDOT is convinced that there is a reasonable basis to conclude that it can achieve a level of DBE participation consistent with the objectives of Subpart A of Part 26 using different or innovative means other than those that are provided in Subpart B or C of Part 26. Therefore, INDOT respectfully submits its waiver requests from the following five (5) requirements of Part 26:

**Payment of Retainage to Subcontractors within a Certain Period of Time following Successful Completion (26.29(a))**

Section 26.29(a) of Part 26 states “ [Y]ou must establish a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than a specific number of days from receipt of each payment you make to the prime contractor. This clause must also require the prompt return of retainage payments from the prime contractor to the subcontractor within a specific number of days after the subcontractors work is satisfactorily completed.”

The objective of this provision is to improve cash flow for subcontractors and to improve the ability of these subcontractors, including DBEs subcontractors, to compete in the marketplace. Indiana law requires INDOT to withhold three percent (3%) retainage from payments to prime contractors until substantial completion of the contract. Requiring prime contractors to make payments of that three percent (3%) to subcontractors when the prime contractor has not yet been paid by INDOT would be a significant financial burden on prime contractors.

Indiana has taken steps in recent years to accomplish this objective. These include:

- a. The amount of retainage was reduced from five percent (5%) to three percent (3%) in 1995. The low level of this retainage, by itself, will help accomplish the objective of this provision.
- b. Upon substantial completion of a contract, INDOT only holds one-half (1/2) of one percent (1%) until the contract is totally closed.
- c. Inclusion of the contract clause that the prime contractor must pay subcontractors within ten (10) business days of the prime contractor being paid by INDOT will also apply to retainage payments.

**The Limitation that a Protégé Can Be Used and Counted Towards the Goal for No More than Every Other Contract (26.35(b)(2)(ii))**

Section 26.35(b)(2)(ii) of Part 26 states “[A]s part of a BDP or separately, you may establish a “mentor-protégé” program, in which another DBE or non-DBE firm is the principal source of business development assistance to a DBE firm. During the course of the mentor-protégé relationship, you must not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than every other contract performed by the protégé firm.”

INDOT seeks a waiver from this requirement because it believes it can prevent undue control of the protégé by:

- a. Adequately reviewing the DBE firm through the certification process;

- b. Requiring the mentor/protégé relationship to be defined through a Business Development Plan; and
- c. Limiting the amount of DBE credit a non-DBE mentor firm obtains for using its own protégé firm to not more than one-half (1/2) of its goal on any contract.

This waiver request is important for several reasons. First, prime contractors do not know which bids they will be awarded when bids are submitted. Second, subcontractors do not know in a particular month what the order will be for the work they perform three (3) or four (4) months later. Third, one job may be a two-day job while another job is a two-month job. Therefore, it would be virtually impossible to determine the meaning of “every other contract,” as required by 26.53(b)(2)(ii).

**Submittal of Written Confirmation from a DBE that It Is Participating in the Contract as provided in the Prime Contractor’s Commitment (26.53(b)(2)(v))**

Section 26.53(b)(2)(v) of Part 26 states “[I]n your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following: [A]ll bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b) (3) of this section: [W]ritten confirmation from the DBE that it is participating in the contract as provided in the prime contractor’s commitment.”

Because decisions are often made at the last moment in determining which subcontractors to use on a project, it would be an administrative burden to require a prime contractor to obtain a written confirmation from all DBE firms that will be used on a contract. Delaying the award of a contract until such information is submitted is also impractical since this may delay the start of construction and further limit an already limited construction season.

The purpose of this requirement is to prevent prime contractors from listing DBE commitments in order to meet the goal without any real intention of utilizing those DBE firms. INDOT has in place several safeguards it believes already accomplish this objective. These include:

- a. INDOT’s Civil Rights Division reviews contract commitments before award of the contract and then makes this information available to any concerned DBE firm. This information is also available for public review;
- b. A prime contractor that lists a particular DBE firm on the commitment form is obligated to use that firm, unless the prime contractor receives approval from INDOT to make a change. This is required by Section 103.01(c) of INDOT’s Standard Specifications;
- c. A subcontract or lease form signed by the DBE firm must be submitted to and approved by INDOT before that firm starts work. This form verifies that the firm knows it will be doing the work. A subcontract or lease form showing another firm as performing this work would indicate a possible contract violation;
- d. Payroll data will also verify that a particular DBE firm is working on the contract; and
- e. Prime contractors can have restrictions placed on their ability to bid in future months for not using the DBE firms listed on the commitment form. This action – either

reducing the amount of work that the prime contractor can have under contract or suspending the firm's right to bid for a period of time – can be taken by INDOT's Prequalification Committee. Such sanctions have been imposed in the past for such contract violations.

### **Counting of Work Performed by a DBE Prime Contractor (26.55(a))**

Section 26.55(a) of Part 26 states “[W]hen a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals.”

The objective of this provision is to ensure that DBE credit is awarded only for work actually being performed by DBEs themselves, and INDOT believes its current procedure addresses this objective for the following reasons:

- a. INDOT's Standard Specifications require the prime contractor to perform at least 50% of the work with its own employees on virtually all contracts, and second tier contracting is not allowed;
- b. DBE prime contractors must comply with the contract DBE Goal and Good Faith Efforts like other non-DBE prime contractors and also (1) must provide a bond to cover the full amount of the contract, (2) are responsible for the work performed by subcontractors, (3) may be held responsible if a subcontractor does not pay the appropriate wages, and (4) are at risk for the full amount of the contract;
- c. All contractors and consultants should be treated alike. Counting towards the goal only the work directly performed by the DBE prime contractor, rather than the full amount of the contract, gives the impression that a contract awarded to a DBE prime contractor is something less than a contract awarded to a non-DBE prime contractor;
- d. Accurate information is needed to set reliable goals. Segregating the work performed by a DBE prime contractor from the work it subcontracts and then segregating the subcontracted work between DBE and non-DBE subcontractors will make it more difficult to get reliable information. In addition, it will also require record keeping by DBE prime contractors that is not required of non-DBE prime contractors; and
- e. A considerable amount of paperwork will be necessary to track the work subcontracted by the prime contractor, and considerable resources will have to be invested by the prime contractor and INDOT to complete and track this paperwork. This additional administrative burden and cost is an unwise use of limited resources and can put the DBE prime contractor at a competitive disadvantage.

### **Counting of Work Performed by DBE Trucking Firms (26.55(d)(1) – (6))**

Section 26.55(d)(1) – (6) of Part 26 states in pertinent part “[T]he DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals. The DBE must itself own and operate at least one fully licensed, insured and operational truck used on the contract. The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures and operates using drivers it employs. The

DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.”

The objective of this provision is to ensure that DBEs have overall control of trucking operations and own at least one (1) truck. INDOT believes the process it developed several years ago will better accomplish this objective and, therefore, seeks a waiver from this requirement and proposes to continue using its current process.

INDOT’s process was developed after INDOT became aware of a situation where a small DBE trucking firm was credited with a large volume of hauling, which was well beyond the capabilities of that firm. Under current practice, INDOT limits the amount of hauling by a DBE trucking firm that can be counted towards the DBE goal. The limit is the dollar volume of hauling attributable to a maximum of twice the number of vehicles owned by the DBE trucking firm or leased from another DBE trucking firm for use on a project. This process has worked effectively on INDOT contracts and gives both the DBE trucking firm and the prime contractor more flexibility than the federal regulations. Minimal abuses of DBE trucking have been reported to INDOT since this process was implemented. In addition, this process will ensure that the DBE trucking firm has overall control of trucking operations and owns at least one (1) truck. Furthermore, this process better enables small DBE trucking firms to compete in the highway construction market. Finally, this process recognizes that leasing is a normal course of business for the trucking industry, rather than a manipulation of trucking operations.

Ownership will also include vehicles leased under a long-term lease agreement of one (1) year or longer. INDOT will continuously monitor the amount of hauling by DBE trucking firms to ensure that the prime contractor is not given credit for use of DBE trucking firms beyond the 1:1 formula by:

- a. Requiring the filing of lease agreements before a leased truck is allowed on the jobsite; and
- b. Monitoring payroll records.

# **CERTIFICATION**

**(ATTACHMENT A)**

## **PREFACE**

Through a Memorandum of Understanding, the Indiana Department of Administration (IDOA) provides for certification to those applying for status as a Disadvantaged Business Enterprise (DBE) for the Indiana Department of Transportation (INDOT). Using 49 CFR Parts 23 and 26 and applicable State law as authority, the following describes the methodology and guidelines that will be used to perform the certification process for the DBE program.

This document is subject to modification based on, but not limited to, the following:

1. Amendments to 49 CFR Parts 23 and 26;
2. Changes in state statutes;
3. Modifications as a result of the Unified Certification Program, whose creation is required a result of 49 CFR Part 26; and
4. Judicial decisions that modify the program.

## **METHODOLOGY**

The goal of the certification administrator is to provide for efficient processing of required information in a timely manner to provide INDOT candidates for the DBE program who have proven that they qualify, in form and substance, as socially and economically disadvantaged based on the definition provided in 49 CFR Part 26. To achieve that goal, all participants in the certification process must be fully aware of the requirements for certification and the process involved in obtaining certification. To that end, the following process will be used.

### **I. DISTRIBUTION OF APPLICATION**

Applicants may obtain a copy of the Application for Certification (application) by writing, faxing or calling in a request. In addition, the application will be available on the IDOA website at <http://www.state.in.us/idoa/minority/dbespect.htm>. IDOA anticipates that appropriate links will be made by affiliated agencies/organizations whose constituents/membership would benefit from this information.

Information with the application may include, without limitation, the following:

- a. A welcome and introductory letter, which will also explain the additional documents in the packet;
- b. A checklist for applicants to use while completing the certification application;
- c. A letter outlining the certification process;
- d. Selected text from 49 CFR Part 26;
- e. Vendor registration application; and
- f. Information on doing business with other state agencies.

### **II. APPLICATION AND ADDITIONAL DOCUMENTS**

Prior to September 1, 1999, the application distributed by the USDOT (DOT) former Region 5 will be used. There has been communication that a national application may be distributed. Also, there has been discussion that a DOT Resource Center application may be distributed. Until such time that any of these become available, IDOA will develop an application to be used from September 1, 1999 until the national or regional application becomes available.

The contents of the application may include, without limitation, any of the following:

- a. Name of individual(s) applying for certification;
- b. Name of firm for which the individual is applying;
- c. Street address of firm (including City, State and Zip);



- d. Mailing address of firm (including City, State and Zip);
- e. Telephone number;
- f. Facsimile (fax) number;
- g. E-mail address;
- h. Information on the type of firm;
- i. Information relating to business size & status;
- j. Specific information on ownership;
- k. Personal information on the owners;
- l. Identification of officers of the firm;
- m. Identification of board of directors;
- n. Identification of management roles and responsibilities;
- o. Acknowledgment of relationships with other firms;
- p. Identification of technical service assistance providers & trade affiliations;
- q. Banking, bonding, lending information;
- r. Identification of licenses;
- s. Other identifications and certifications;
- t. Revenue history;
- u. Contractual and work histories;
- v. Specific description of business (for directory coding purposes);
- w. For suppliers, information on inventory;
- x. For truckers, information on the number of trucks owned/leased;
- y. Names, titles and signatures of persons authorized to execute contracts;
- z. Information on doing business with INDOT; and
- aa. Sworn Affidavit that information is true.

In addition to the application proper, applicants will be asked to provide additional documentation which may include, without limitation, the following:

- a. Proof of initial investment to acquire ownership;
- b. Detailed work/experience resumes of owners, board members and other key personnel;
- c. Appropriate documentation for the type of firm (e.g., Partnership Agreements, By-laws, Stockholders' Meeting minutes, Shares ledgers);
- d. Proof of ethnicity/gender which qualifies applicant for social disadvantage;
- e. Equipment lists;
- f. Copies of leases;
- g. Financial statements;
- h. Copies of loan agreements;
- i. Copies of other certifications and/or denials;

- j. Schedule of salaries paid to all officers, managers, directors and owners;
- k. Copy of corporate bank resolutions;
- l. Description of real estate and proof of ownership;
- m. Copy of signed leases for office/storage space;
- n. Copies of relevant licenses;
- o. Corporate tax returns;
- p. Personal tax returns for each owner;
- q. Pre-qualification information, if applicable;
- r. Sworn and notarized statement of social disadvantage; and
- s. Sworn and notarized statement of economic disadvantage.

### **III. THE APPLICATION PROCESS**

The application process may include, without limitation, the following:

#### **A. Acknowledgment**

Within five (5) business days of the application being received, the application will be entered into a vendor tracking database. That entry will generate a letter for the applicant. The purpose of the letter is to:

- 1. Acknowledge receipt of the application, and
- 2. Restate the process, including a time line.

#### **B. Initial Review**

Within thirty (30) business days of the application being received, a letter will be sent to the applicant. The type of letter and its content will be dependent on the results of the initial review.

- 1. If the application is complete, defined in 49 CFR § 26.83 as having received all information required, in-state applicants will receive a letter stating that they will be contacted within thirty (30) business days for an on-site visit and review.

Out-of-state firms are required to be certified with their home state before applying for certification with Indiana. Firms are required to receive an on-site from their home state prior to certification. Therefore, complete out-of-state applications will include the home state certification and on-site. These applications may go directly to the Deputy Commissioner of Administration for Minority Business Development for Conclusive Review.

2. If the application is not complete, the applicant will receive a letter requesting additional documentation. The letter will also include a checklist with those items highlighted for ease in reading. A date by which all of the information is to be returned will be given in the letter, as well.

This process will continue until the application is considered complete. The applicant will then be issued the letter regarding the on-site visit.

If the information is not received by the deadline, the applicant will be issued a final notice. If there is no response, the file will be closed without further consideration.

Conversations with and correspondence to or from the applicant is recorded in the vendor tracking system, which is readily accessed by any member of the certification team through a Local Area Network.

#### **C. Timetable**

At the time the application is considered complete, the Certification Operations Coordinator is responsible for ensuring that the application moves through the rest of the process quickly enough to satisfy the 90-day completion rule in accordance with 49 CFR Part 26. Any occasion where IDOA is unable to complete the decision within the 90 days, the time may be extended by 60 days. If this is deemed necessary, the firm will receive a written notice of the extension explaining fully and specifically the reasons for the extension.

#### **D. On-site Visit and Review**

On-site visits and reviews may include, without limitation, the following process.

The Certification Operations Coordinator sorts completed applications by State districts. Members of the certification team conduct on-site visits and reviews. Specific dates are established for on-site visits. These dates are usually for a full-week period every 3-4 weeks. There are usually two (2) team members conducting on-sites during this time. One covers the northern portion of the state, the other covers the southern portion of the state. Team members rotate visits to different parts of the state.

On-site visits are scheduled on a first-completed, first-appointment basis, subject to applicant availability. Appointments are normally scheduled two (2) weeks in advance. Applicants are contacted, in

order, until such time as the appointment calendars of the visiting team members are filled. Each team member conducting on-sites usually completes 12-15 visits per on-site week, if sufficient firms are available in their appointed area for that week.

While on-sites are as unique in character as each application received, the information verified and/or obtained during the visit may include, without limitation, the following:

1. Firm name;
2. Applicant(s) name, title, ethnicity and percentage of ownership;
3. Company background information:
  - a. When, why and how the company was started
  - b. Original owner(s)/principal(s) of the business
  - c. Trade names - past and present
  - d. Type of work for which they are seeking certification
  - e. Purpose of DBE application
4. Financial information:
  - a. Source(s) of investment capital
  - b. Source(s) and amount(s) of loans
  - c. Source(s) and amount(s) of bonding
  - d. Random review of checks
  - e. Review of accounting system
  - f. Review of selected contracts
  - g. Review actual or potential affiliations
5. Personnel information:
  - a. Size of work force
  - b. Affiliations of owners/officers
  - c. Relationship of owners to other officers/employees
  - d. Duties/responsibilities of key personnel
  - e. Method of monitoring job costs
  - f. Method of monitoring project performance
  - g. Method(s) of obtaining employees
6. Equipment information:
  - a. Sources and ownership of equipment
  - b. Analysis of personnel to operate equipment
  - c. Sharing of equipment
  - d. Renting and leasing equipment
7. Facilities information:
  - a. General description of facility
  - b. Sharing of facility

- c. Technical assistance
8. Additional information (for trucking firms only):
- a. Count of number of trucks owned & leased
  - b. Documentation substantiating the count
  - c. If the firm is to be considered a hauler and supplier, the applicant must provide invoices documenting his/her purchase of aggregates or other materials.

Because 49 CFR Part 26 requires that certification now include specific areas of work, there will be occasions where technical advisors are needed for some visits. At those times, visits will include an appropriate representative from the INDOT district or central office.

#### **E. Final Review**

The Certification Coordinator who has been assigned the file does final review. Assignment is usually the result of conducting the on-site visit and review. The order of process for final review may include, without limitation, the following:

1. Statement(s) of Social Disadvantage - sworn and notarized. Answered appropriately in accordance with 49 CFR Part 26.
2. Statement(s) of Economic Disadvantage - sworn and notarized. Answered appropriately in accordance with 49 CFR Part 26.
3. Comparisons of on-site visit responses to application.
4. Review of business size - to determine if company's annual revenue and/or number of employees are within the guidelines in accordance with 49 CFR Part 26.
5. Review of ownership - to determine if applicant's ownership of the firm meets the requirements of 49 CFR Part 26.
6. Review of control - to determine if, in form and substance, the applicant's control of the firm meets the requirements of 49 CFR Part 26.
7. Review of technical expertise - to determine if, in form and substance, the applicant's technical expertise meets the requirements of 49 CFR Part 26.

A recommendation of certification or denial is made, and the file is forwarded to the Deputy Commissioner of Administration for Minority Business Development (or his/her designee) for Conclusive Review.

#### **F. Conclusive Review**

The Deputy Commissioner of Administration for Minority Business Development (or his/her designee) performs a conclusive review. If the recommendation is to certify, and the Deputy Commissioner agrees, the firm will be certified as described in Item G of this section. If the recommendation is to deny, and the Deputy Commissioner agrees, the file will be processed as described in Section IV of this document.

If the Deputy Commissioner does not agree with a recommendation, a team will be created to review the file. The review team, which includes the Deputy Commissioner, will be required to reach consensus on the file.

#### **G. Certification**

If a firm is considered eligible for certification, a letter acknowledging the same is sent to the applicant.

The certification period will be for three (3) years. On an annual basis, between certifications, firms will be required to submit a Statement of No Change. This statement is a sworn and notarized document affirming there has been no change in the basic operations of the firm that would adversely impact its status as a Disadvantaged Business Enterprise.

Firms with changes must submit a Notice of Change form within seven (7) days of the changes. Based upon the type of change, additional action may be required by certification administrators. If the DBE fails to provide the notice of change, IDOA may take steps to remove the firm from eligibility, as described in Section IV.

Six (6) months prior to the end of the certification period, firms will receive a new Application for Certification. They will start the process as new firms, as defined above. The intent is to get the process done so that there will be no time lost between certification periods.

IDOA will maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in the program. In the listing for each firm, IDOA will include its address, phone number and the types of work the firm has been certified to perform as a DBE. The directory will be updated by

IDOA and provided to contractors upon request. IDOA shall make the directory available to the public upon request. The Directory will also be available on-line from the IDOA home page.

#### **IV. DENIAL OF CERTIFICATION/REMOVAL FROM ELIGIBILITY**

##### **A. Denial of Certification**

If, after Final and Conclusive reviews, it is recommended that a firm not be certified, the applicant will be sent a letter of denial. The letter may include, without limitation, the following:

1. An explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial;
2. Instructions on the appeal process, under §26.89; and
3. The time frame for reapplication, which is nine (9) months.

##### **B. Removal from Eligibility**

If a firm has been identified as no longer qualifying for the program and the time of that identification is within the three (3) year certification period, the firm may be removed from eligibility. Sources for information and the process for dealing with the information include the following.

###### **1. Ineligibility (Third-party) complaints**

Any person may file with IDOA a written complaint alleging that a currently-certified firm is ineligible. The complaint may include specific allegations as to why the firm should be ineligible and any information or arguments supporting the complainant's assertion that the firm is ineligible. Confidentiality of the complainant's identity will be protected. All complaints will receive a review.

IDOA will review its records concerning the firm, any material provided by the complainant, and other available information. It may request information from the firm or conduct any other investigation deemed necessary.

If it is determined, based on this review, that there is reasonable cause to believe that the firm is ineligible, IDOA will provide written notice to the firm that it proposes to find the firm ineligible. In the notice, IDOA will set forth the reasons for the proposed determination.

If it is determined, based on this review, that reasonable cause does not exist, IDOA will notify the complainant and the firm in writing of this determination, including the reasons.

All statements of reasons for findings on the issue of reasonable cause will specifically reference the evidence in the record on which each reason is based.

2. INDOT/IDOA-initiated proceedings

If, based on the notification by the firm of a change in its circumstances or other information that comes to the attention of INDOT and/or IDOA, IDOA determines that there is reasonable cause to believe that a currently-certified firm is ineligible, IDOA will provide written notice to the firm that it proposes to find the firm ineligible, setting forth the reasons for the proposed determination.

All statements of reasons for findings on the issue of reasonable cause will specifically reference the evidence in the record on which each reason is based.

3. DOT directive to initiate proceedings

If the concerned operating administration (DOT or FHWA) determines that information in IDOA certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a currently-certified firm does not meet the criteria for eligibility, the concerned operating administration may direct IDOA to initiate a proceeding to remove the firm's certification.

The concerned operating administration must provide IDOA and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

IDOA will immediately commence and prosecute a proceeding to remove eligibility. IDOA will provide written notice to the firm that it proposes to find it ineligible, setting forth the reasons for the proposed determination.

All statements of reasons for findings on the issue of reasonable cause will specifically reference the evidence in the record on which each reason is based.

**C. Hearings**

When a firm has been notified that there is reasonable cause to remove its eligibility, IDOA will give the firm an opportunity for



an informal hearing. At that time, the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

In such a proceeding, IDOA bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of 49 CFR Part 26.

IDOA will maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to U.S. Department of Transportation, IDOA will provide a transcript of the hearing to USDOT and, on request, to the firm. IDOA will retain the original record of the hearing. IDOA will charge the firm only for the cost of copying the record.

If the firm elects to present information and arguments in writing, in lieu of a hearing, IDOA bears the same burden of proof.

Firms will have thirty (30) calendar days from the date of the notice proposing removal of eligibility to request an informal hearing or present information and arguments in writing. The request or information should be forwarded to: Commissioner, Indiana Department of Administration, 402 West Washington Street, W479, Indianapolis, IN 46204.

#### **D. Separation of Functions**

IDOA will ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

The decision maker will be an individual who is knowledgeable about the certification requirements of the state's DBE program and 49 CFR Part 26. The decision maker will be an individual who has experience in areas such as, or similar to the following: administrative law judge, mediator, arbitrator and negotiator. The decision maker will work independently of IDOA to notify all parties of hearings, decisions or other actions.

#### **E. Grounds for Decision**

IDOA will not base a decision to remove eligibility on a reinterpretation or changed opinion on information available at the

time the firm was initially certified. Rather, decisions to remove eligibility can only be for one or more of the following causes:

1. Changes in the firm's circumstances since the certification of the firm by the recipient that rendered the firm unable to meet the eligibility standards of 49 CFR Part 26;
2. Information or evidence not available to IDOA at the time the firm was certified;
3. Information that was concealed or misrepresented by the firm in previous certification actions by IDOA;
4. A change in the certification standards or requirements of the Department since the last time the firm was certified by IDOA; or
5. A documented finding that IDOA's determination to certify was factually erroneous.

**F. Notice of Decision**

Following the decision, IDOA will provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice will inform the firm of the consequences of IDOA's decision and of the availability of an appeal to the U.S. Department of Transportation. If this decision was initiated from an Ineligibility (Third-party) complaint, a copy of the Notice will be sent to the complainant. If the concerned operating administration directed IDOA to initiate the proceeding, a copy of the Notice will be sent to that operating administration.

**G. Status of Firm During Decision**

1. A firm remains an eligible DBE during the pendency of IDOA's proceeding to remove its eligibility.
2. A firm does not become ineligible until the issuance of the Notice of Decision.

**H. Effects of Removal of Eligibility**

When a firm is removed from eligibility, the following steps will be taken:

1. When a prime contractor has made a commitment to use

the ineligible firm, or INDOT has made a commitment to use the firm as a prime contractor, but a subcontract or contract has not been executed before IDOA issues the Notice of Decision, the ineligible firm does not count toward the contract goal or overall goal. The prime contractor will be directed to meet the contract goal with an eligible DBE firm or demonstrate that it has made a good faith effort to do so.

2. If a prime contractor has executed a subcontract with the firm before IDOA notifies the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward the DBE goal for the firm's work. In this case, or in a case where a prime contract was let to a DBE later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the issuance of the notice of its eligibility shall not count toward INDOT's overall goal, but may count toward the contract goal.
3. Exception: If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, INDOT may continue to count its participation on that contract toward overall and contract goals.

#### **I. Availability of Appeal**

When IDOA makes an administratively final removal decision of a firm's eligibility under 49 CFR Part 26, the firm may appeal the removal to the U.S. Department of Transportation as provided for in § 26.89.

### **GUIDELINES**

These guidelines are based on 49 CFR Parts 23 and 26, specifically Subparts D & E. The following are the guidelines for certification, incorporating those areas where recipients could modify or decide on certain issues. Only those concerns certified as DBEs under these regulations are eligible to participate as DBEs in USDOT-assisted contracts.

#### **I. PREFACE**

- A. In determining whether to certify a firm as eligible to participate as a DBE, all standards set forth must be applied.

- B. The firm seeking certification has the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements concerning:
  - 1. Group membership or individual disadvantage;
  - 2. Business size;
  - 3. Ownership; and
  - 4. Control.
- C. IDOA must rebuttably presume that members of the designated groups identified are socially and economically disadvantaged.
- D. Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving, by a preponderance of the evidence, that they are socially and economically disadvantaged.
- E. IDOA must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

## **II. RULES GOVERNING GROUP MEMBERSHIP DETERMINATION**

### **A. Designated group**

- 1. It is rebuttably presumed that members of the following groups, who are citizens of the United States (or lawfully admitted permanent residents), are socially and economically disadvantaged individuals:
  - a. Women
  - b. Black Americans
  - c. Hispanic Americans
  - d. Native Americans
  - e. Asian-Pacific Americans
  - f. Subcontinent Asian Americans
  - g. Other minorities found to be disadvantaged by the U.S. Small Business Administration (SBA)

2. Individuals who are in a designated group do not have the burden of proving that they are socially and economically disadvantaged. However, they do have the obligation to provide information concerning their economic disadvantage. Annually, they shall sign an affidavit attesting to their social disadvantage.
3. If there is reason to question whether an individual is a member of a designated group, the individual is required to demonstrate, by a preponderance of the evidence, that he or she is a member of the group.
4. In making a determination on whether an individual is a member of a designated group, consideration is given to whether the person has held himself out to be a member of the group over a long period of time prior to the application for certification and whether the person is regarded as a member of the group by the relevant community. The individual may be required to produce documentation of group membership.

**B. Others**

Individuals who are not presumed to be socially and economically disadvantaged, i.e., not members of the designated groups, must demonstrate social and economic disadvantage on an individual basis.

**C. Appeals**

Decisions concerning membership in a designated group are subject to the certification appeals procedure as outlined in 49 CFR § 26.89.

**III. RULES GOVERNING BUSINESS SIZE DETERMINATION**

**A. Size**

To be an eligible DBE, a firm, including its affiliates, must be an existing small business, as defined by SBA standards. Current SBA business size standards, found in 13 CFR part 121, will be applied to the appropriate type(s) of work the applicant firm seeks to perform.

**B. Revenue**

A firm eligible under paragraph A hereof will not qualify as an eligible DBE in any Federal fiscal year if the firm, including its affiliates, has had average annual gross receipts over the firm's previous three fiscal years that exceed the regulations as defined by the SBA standards, found in 13 CFR 121.402. The Secretary of Transportation may adjust this amount for inflation from time to time.

#### **IV. RULES GOVERNING SOCIAL AND ECONOMIC DISADVANTAGE DETERMINATION**

##### **A. Presumption of disadvantage**

1. Members of designated groups are presumed to be socially and economically disadvantaged. Applicants are required to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.
2. Each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification, must submit a signed, notarized statement of personal net worth, with appropriate supporting documentation. This statement and documentation will not be unduly lengthy, burdensome or intrusive. Notwithstanding any provision of state law, IDOA will not release an individual's personal net worth statement nor any documentation supporting it to any third party without the written consent of the submitter. However, IDOA will transmit this information to DOT in any certification appeal proceeding under 49 CFR § 26.89 in which the disadvantaged status of the individual is in question.
  - a. In determining net worth, an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm) will be excluded.
  - b. A contingent liability will not reduce an individual's net worth.
  - c. The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than

an Alaska Native Corporation (ANC) and exclude any of the following which the individual receives from any ANC:

- i. Cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum;
- ii. Stock (including stock issued or distributed by an ANC as a dividend or distribution on stock);
- iii. A partnership interest;
- iv. Land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock);
- v. Interest in a settlement trust.

**B. Rebuttal of presumption of disadvantage**

- 1. If the statement of personal net worth that an individual submits shows that the individual's personal net worth exceeds \$750,000, the individual's presumption of economic disadvantage is rebutted.
- 2. If, at any time, there is a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged, IDOA may initiate a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual.
- 3. Procedures for the proceeding will be in accordance with Guidelines - Section IV.
  - a. In such a proceeding, IDOA has the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. However, IDOA may require the individual to produce information relevant to the determination of his or her disadvantage.

4. When an individual's presumption of social and/or economic disadvantaged has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility, unless and until he or she makes an individual showing of social and/or economic disadvantaged. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantaged.

**C. 8(a) and SDB firms**

If a firm applying for certification has a current, valid certification from, or is recognized by, the SBA under the 8(a) or small and disadvantaged business (SDB) program (except an SDB certification based on the firm's self-certification as an SDB), IDOA may accept the firm's 8(a) or SDB certification in lieu of conducting its own certification proceeding, just as IDOA may accept the certification of another DOT recipient for this purpose. However, IDOA is not required to do so.

**D. Individual determinations of social and economic disadvantage**

Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. IDOA must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating, by a preponderance of the evidence, that the individuals who own and control the firm are socially and economically disadvantaged. In making these determinations, the applicant must provide sufficient information to permit determination of the following:

**1. Social disadvantaged**

Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without



regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

- a. At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;
- b. Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and
- c. Negative impact on entry into or advancement in the business world because of the disadvantage. IDOA will consider any relevant evidence in assessing this element. In every case, however, IDOA will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

- i. Education

IDOA will consider such factors as denial of equal access to institutions of higher education and vocational training; exclusion from social and professional association with students or teachers; denial of educational honors rightfully earned; and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

- ii. Employment

IDOA will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and

fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.

iii. Business history

IDOA will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business and professional organizations.

d. People with disabilities

The USDOT advises that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities - especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments) - may be socially and economically disadvantaged.

Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, IDOA shall look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment

about whether such an individual meets the requirements for social and economic disadvantage.

2. Economic disadvantaged

a. Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

b. Submission of narrative and financial information

Each individual claiming economic disadvantage must describe the conditions which are the basis for the claim in a narrative statement, and must submit personal financial information.

ii. When married, an individual claiming economic disadvantage also must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.

c. Factors to be considered

In considering diminished capital and credit opportunities, IDOA will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including:

i. Personal income for the past two years (including bonuses and the value of company stock given in lieu of cash);

ii. Personal net worth;

iii. Fair market value of all assets, whether encumbered or not;

- iv. Financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals. The profiles to be compared may include, without limitation, total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.
- d. Transfers within two years
  - i. IDOA will not attribute to an individual claiming disadvantaged status any assets transferred by the individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.
  - ii. Recipients will attribute to an individual claiming disadvantage status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for one of the following reasons:
    - a. That immediate family member's education, medical expenses, or some other form of essential support; or

- b. Customary recognition of special occasions as defined above.
- iii. In determining an individual's access to capital and credit, IDOA may consider any assets that the individual transferred within such two-year period described above that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

## **V. RULES GOVERNING OWNERSHIP DETERMINATION**

- A. To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.
  - 1. In the case of a corporation, such individuals must own at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.
  - 2. In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the partnership agreement.
  - 3. In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.
  - 4. In the case of other business structures, the majority ownership, as defined by the business structure, must be owned by socially and economically disadvantaged individuals.
- B. The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership interests, as demonstrated by the substance, not merely the form, of arrangements.
- C. All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as

expressly provided for herein, no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if:

1. The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or
2. The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.

D. Contributions of capital

1. The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Under guidance of 49 CFR § 26.69, examples of insufficient contributions include:
  - a. A promise to contribute capital;
  - b. An unsecured note payable to the firm or an owner who is not a disadvantaged individual; or
  - c. Mere participation in a firm's activities as an employee.
2. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

E. The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

1. The owner's expertise must be:

- a. In a specialized field;
    - b. Of outstanding quality;
    - c. In areas critical to the firm's operations;
    - d. Indispensable to the firm's potential success;
    - e. Specific to the type of work the firm performs; and
    - f. Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.
  2. The individual whose expertise is relied upon must have a significant financial investment in the firm.
- F. IDOA will always deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual:
1. As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with other DOT, INDOT or IDOA guidelines; or
  2. Through inheritance, or otherwise because of the death of the former owner.
- G. Exceptions
1. IDOA will presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is:
    - a. Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
    - b. Involved in the same or a similar line of business; or

- c. Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.
  - 2. To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate, by clear and convincing evidence, that:
    - a. The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
    - b. The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.
- H. IDOA will apply the following rules in situations in which marital assets form a basis for ownership of a firm:
- 1. When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. IDOA will not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.
  - 2. A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.
- I. IDOA may consider the following factors in determining the ownership of a firm. However, IDOA will not regard a



contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because:

1. A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in other sections of these guidelines;
2. There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
3. Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, IDOA will give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

## **VI. RULES GOVERNING CONTROL DETERMINATION**

- A. Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.
  1. In determining whether a potential DBE is an independent business, IDOA will scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
  2. IDOA will consider whether present or recent employer/ employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.
  3. IDOA will examine the firm's relationships with prime contractors to determine whether a pattern of

exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

4. In considering factors related to the independence of a potential DBE firm, IDOA will consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

- B. A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This does not preclude a spousal co-signature on documents as provided for in other sections of this subpart.
- C. The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.
  1. A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).
  2. In a corporation, disadvantaged owners must control the board of directors.
  3. In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.
- D. Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

- E. The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policy making, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that IDOA can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.
- F. The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policy making. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.
- G. If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, IDOA will not deny certification solely on the ground that the person lacks the license or credential. However, IDOA will take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

## H. Remuneration

1. IDOA will consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether or not to certify a firm as a DBE. Such consideration shall be in the context of the following:
  - a. Duties of the persons involved;
  - b. Normal industry practices;
  - c. The firm's policy and practice concerning reinvestment of income; and/or
  - d. Any other explanations for the differences proffered by the firm.

IDOA may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

2. In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, IDOA will consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

- I. In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

J. Family-operated businesses

1. A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided, IDOA will make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as is done in other situations, without regard to whether or not the other persons are immediate family members.
2. If IDOA cannot determine that the socially and economically disadvantaged owners - as distinct from the family as a whole - control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

K. Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate, by clear and convincing evidence, that:

1. The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
2. The disadvantaged individual actually controls the management, policy and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

L. In determining whether a firm is controlled by its socially and economically disadvantaged owners, IDOA will consider whether the firm owns equipment necessary to perform its work. However, IDOA will not determine that

a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

- M. IDOA will grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in additional types of work, the firm need demonstrate only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. IDOA will not, in this situation, require that the firm be recertified or submit a new application for certification. Rather, IDOA will verify the disadvantaged owner's control of the firm in the additional type of work.
- N. A business operating under a franchise or license agreement may be certified if it meets the standards in the regulations and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, IDOA will generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right or profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.
- O. In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.
- P. The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an

employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

## **VII. OTHER RULES GOVERNING CERTIFICATION**

### **A. Commercially Useful Function**

1. Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. Except as provided in this section, IDOA must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.
2. IDOA may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.

### **B. Present Circumstances**

IDOA will evaluate the eligibility of a firm on the basis of present circumstances. IDOA will not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards. Neither will IDOA refuse to certify a firm solely on the basis that it is a newly formed firm.

### **C. Cooperation of Applicant**

DBE firms and firms seeking DBE certification shall cooperate fully with requests from IDOA and DOT for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

### **D. For-Profit Status**

Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by

socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.

**E. Firms as Owners**

An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided below, a firm that is not owned by such individuals, but instead is owned by another firm - even a DBE firm - cannot be an eligible DBE.

1. If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, the subsidiary may be certified if it otherwise meets all requirements for certification. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.
2. IDOA may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. Examples of the application of this rule are found in 49 CFR ' 26.73.

**F. Tax Recognition**

Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that the firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.

**G. Prequalification**

IDOA will not require a DBE firm to be prequalified as a condition for certification, unless rules are changed and require all firms that participate in its contracts and subcontracts to be prequalified.

**H. Special Designated Groups**

A firm that is owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity,



rather than by Indians, Alaska Natives, or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standard for certification, and must be controlled by socially and economically disadvantaged individuals, as more fully set forth in 49 CFR Parts 23 and 26.